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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GLEN H. SENGPIEL, DONALD E. KELLY
and DONALD R. GOTTSCHALK,

Petitioners,

vs.

THE B.F. GOODRICH COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit correctly determine that an employer that transferred its pension and welfare plan obligations for retirees to a successor in interest without the consent of the retirees: (1) did not act as a fiduciary under ERISA; and (2) even if a fiduciary, did not breach its fiduciary duty because the benefits were not vested?

2. Did the Sixth Circuit correctly determine that a retired employee who seeks to prove a *vested* right to lifetime benefits must show clearly and affirmatively that the employer intended to provide such lifetime benefits?

STATEMENT PURSUANT TO RULE 29.6

Respondent Michelin North America, Inc. (successor in interest to Uniroyal Goodrich Tire Company, Inc.) is a subsidiary of Compagnie Generale Etablissement Michelin, a French entity the stock of which trades on the Paris Bourse (stock exchange). Michelin North America has no other parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF THE CASE

A. Introduction

The petitioners, Glen H. Sengpiel, Donald R. Gottschalk, and Donald E. Kelly (collectively, "Petitioners"), all corporate salaried retirees of the B.F. Goodrich Company ("Goodrich"), brought an action in the United States District Court for the Northern District of Ohio against Goodrich, its benefit plans, Goodrich's successor in interest — the Uniroyal Goodrich Tire Company ("UGTC"), UGTC's benefit plans, and UGTC's successor in interest — Michelin North America ("Michelin"). Petitioners challenged the 1986 transfer of pension and other post-employment benefit plans and plan interests ("the 1986 Transfers") from Goodrich to UGTC on the ground that the 1986 Transfers violated the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The district court held that the 1986 Transfers were neither unlawful nor improper, and granted summary judgment in favor of the defendant corporations and their respective benefit plans. The district court opinion below was published at 970 F. Supp. 1322 (N.D. Ohio 1997) and is reprinted as Petitioners' Appendix B (hereafter, "Pet. App. B"). The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court in all respects. The Sixth Circuit opinion below was published at 156 F. 3d 660 (6th Cir. 1998) and is reprinted as Petitioners' Appendix A (hereafter, "Pet. App. A"). Petitioners seek review of the Sixth Circuit's decision.

B. Facts

In 1977, to comply with a new federal law known as ERISA, Goodrich prepared booklets to summarize and explain the terms of each of its pension and welfare plans. These booklets, described by the new law as "summary plan descriptions" or "SPDs," were distributed to all employees in a single vinyl portfolio that included a more general overview called a "Highlights" booklet. (Pet. App. B at 20a-21a.) The final sentence in the first paragraph of the "Highlights" booklet clearly stated that:

> While the Company expects to continue these benefits indefinitely, it reserves the right at its option to change or discontinue any or all of the programs at any time.

(*Id.* at 21a.)

In 1981, Goodrich revised and updated the SPDs and republished the Highlights booklet — including the above-described reservation of rights clause. (*Id.*) None of the Petitioners deny having received either set of SPDs or the Highlights booklet. (*Id.* at 22a.) The individual SPDs did not contain disclaimers with the exception of Goodrich's Health Care Plan. (*Id.*) Updated in 1986, the SPD for the Goodrich Health Care Plan included the following reservation of rights clause:

> The B.F. Goodrich Company expects to continue the Health Care Plan indefinitely but reserves the right to amend, suspend, or terminate the Plan at any time.

(*Id.*)

In 1986, Goodrich embarked upon a joint venture with the Uniroyal Tire Company ("Uniroyal"). In that joint venture, Goodrich and Uniroyal each spun off its tire operations to form a new tire company capable of competing in the market place. (*Id.* at 23a.) That new company became known as UGTC; at its inception, Goodrich and Uniroyal owned UGTC equally. (*Id.*) The joint venture agreement identified the assets and liabilities that each company would contribute or transfer to the joint venture. Among the liabilities Goodrich spun off and contributed to the joint venture were the pension and welfare benefit plan obligations to retirees associated with Goodrich's tire division. (*Id.*)

The transfer of welfare benefit plan obligations to UGTC did not involve splitting up and spinning off part of the various welfare benefit plans then being maintained by Goodrich and Uniroyal. Rather, the joint venture agreement made clear that UGTC would establish and maintain new welfare benefit plans that would assume those welfare plan obligations being transferred by Goodrich and Uniroyal:

> [UGTC shall] establish and adopt welfare plans which are comparable, taken as a whole, to the welfare plans . . . of Goodrich and Uniroyal which cover employees of the Uniroyal Tire Business and the Goodrich Tire Business that will be hired by [UGTC]. [UGTC] shall assume all liability of Goodrich and Uniroyal for benefits under their present or past welfare plans or those of their predecessors for active, former, and retired employees of the Goodrich Tire Business or the Uniroyal Tire Business.

(*Id.*)

Goodrich did not transfer to UGTC any trusteed or specially earmarked funds to satisfy the welfare plan obligations that it had contributed to UGTC. Goodrich did not do so because ERISA does not (and in 1986, did not) require welfare plan obligations to be pre-funded. (*Id.*) However, Goodrich (and Uniroyal) did transfer operating assets and working capital to the joint venture capable of being used to satisfy their respective welfare plan obligations on an ongoing basis. By contrast, when Goodrich transferred the pension obligations to UGTC in 1986, it complied with ERISA's statutory pension funding requirements by also transferring to UGTC funds, in trust, that were earmarked to satisfy part of the transferred pension obligations. (*Id.*)

Goodrich did transfer the pension and welfare benefit plan obligations of those retirees who had worked exclusively in its tire division. (*Id.*) However, Goodrich concluded that it also should transfer the pension and welfare benefit plan obligations of some of its corporate retirees to preserve the original understanding between Goodrich and Uniroyal regarding the joint venture. (*Id.* at 24a.) Goodrich's organizational structure made it impossible to identify those corporate retirees who had worked exclusively with and for its tire division. (*Id.*) Because Goodrich concluded that it also would be impossible to identify those corporate retirees who had worked most closely with its tire division while with the

company, Goodrich based the transfer decision on the percentage of its total business that had consisted of tire manufacturing and sales. (*Id.* at 25a-26a.)

Goodrich calculated that 42.54% of its total business consisted of tire manufacturing and sales. (*Id.*) Based on that determined percentage, Goodrich transferred to UGTC the pension and welfare benefit plan obligations of 42.54% of its corporate retirees. (*Id.*) To identify those corporate retirees whose obligations would be transferred to UGTC, Goodrich adopted a lottery system based on Social Security numbers. Goodrich would transfer to UGTC the plan obligations relating to those corporate retirees with Social Security numbers ending in 4254 or lower; the plan obligations of those corporate retirees with Social Security numbers ending in digits higher than 4254 would remain with Goodrich. (*Id.*)

Because the Petitioners' Social Security numbers were beneath the 4254 threshold, they were among the 420 corporate retirees required to look to UGTC to satisfy and discharge their pension and welfare benefit plan rights. (*Id.* at 26a.) Goodrich notified all affected retirees by letter in June of 1986, prior to the transfers. (*Id.*) The June 1986 letter informed the affected retirees that, based on a random selection of their Social Security numbers, their pension and welfare benefits would be provided by UGTC. At the same time, the June 1986 letter assured the affected retirees that their pension benefits would not be changed or reduced in any way. However, the June 1986 letter made clear to the affected retirees — including Petitioners — that the rights of the transferred retirees under the "comparable" welfare benefit plans being established by UGTC would remain subject to change: (*Id.*)

> your assignment to the Uniroyal Goodrich retirement rolls means that current life insurance and medical benefits programs for which you may now qualify will be continued, with the understanding that, as in the past, certain provisions may be changed in the future in accordance with the plans.

(*Id.*)

Several of the affected retirees immediately protested the transfer. (*Id.*) Petitioner Gottschalk's protest implicitly recognized the changeable nature of the welfare benefit plans when he wrote, "I am certain we will receive no improvements due to the change and probably can look forward **to further cuts as have been occurring**." (*Id.* at 26a-27a; emphasis supplied.) Additional protests arose in 1987, when Goodrich sold its interest in UGTC to a private investment firm. (*Id.* at 27a.)

Most of the corporate retirees assigned to UGTC kept silent, though, when Goodrich in 1990 reduced the benefits being provided under its welfare benefit plans to the corporate retirees whose obligations had not been transferred to UGTC. (*Id.* at 29a.) One possible reason for the silence was that the corporate retirees whose plan-based rights had been assigned to UGTC were unaffected by the Goodrich reduction.[1] (*Id.*)

The welfare benefits being provided by UGTC to the transferred retirees under its welfare benefit plans remained superior to the benefits being provided by Goodrich until 1995, when rising health care costs forced UGTC to materially reduce the welfare benefits it was providing under its welfare benefit plans. (*Id.*) The retirees who had enjoyed superior benefits for the previous five years broke their silence and renewed their protests by demanding that their plan-based rights be re-transferred to Goodrich's plans. (*Id.*) Once it became clear that their protests would not lead to a re-transfer of their plan-based rights, Petitioners filed their Complaint in the Northern District of Ohio in February of 1996.

C. Procedural History

Petitioners' Amended Complaint, filed in June of 1996, enumerated several claims. Each claim was broadly pleaded under

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1. Among the 1990 Goodrich amendments was an increase in the deductible from $100 to $150 per year for individuals and from $200 to $300 per year for families.

ERISA. However, Petitioners did not allege a breach or other violation by UGTC or Michelin (UGTC's successor in interest) of any duty or obligation imposed on or undertaken by UGTC or Michelin. Petitioners also sought broad relief in their Amended Complaint. First, Petitioners sought to reverse the transfer of pension and other post-employment benefit plan obligations that Goodrich had initiated in 1986. Second, Petitioners sought an award of supplemental benefits, based on certain promises and assurances they claimed to have received from Goodrich officials, years after the transfer.

In granting summary judgment on all counts to Defendants, the district court specifically held that:

1. The 1986 transfers amounted to an amendment of the relevant plans by the plans' settlor and could not be considered a fiduciary act, because the transfers were the inevitable result of a major business decision.

2. Even if the 1986 transfers could be considered a fiduciary act, Goodrich did not breach any fiduciary duty when it engaged in those transfers, because the method adopted — the transfer of a proportionate percentage of corporate retirees to UGTC, based on Social Security numbers — was reasonable in context and as random as any other method.

3. Petitioners' contract-based claims failed because: (i) under ERISA, welfare benefit plan rights presumptively do not vest; (ii) Petitioners have the burden of proving an affirmative intent to vest Petitioners in their plan-based rights for life; and (iii) the documentary evidence that Petitioners produced was insufficient to establish an intent to vest under either a "fair reading" of the relevant

SPDs or a consideration of related documents such as the Highlights booklet distributed to Petitioners.

4. Because the 1986 transfers did not violate ERISA, and the only relief being sought from Michelin was a re-transfer to Goodrich of Petitioners' plan-based obligations, Petitioners had no viable claims against Michelin.

Petitioners appealed the district court's grant of summary judgment to the United States Court of Appeals for the Sixth Circuit. While Petitioners brought numerous claims before the district court, they appealed only two issues to the Sixth Circuit. First, Petitioners asserted that the district court erred in its finding that the transfer of the benefit plan obligations did not constitute a fiduciary act, and that the transfer amounted to a breach of fiduciary duty. Second, Petitioners asserted that the district court clearly erred when it held that Petitioners' contract-based claims were baseless, at least in part because Petitioners claimed that their welfare benefits at issue had vested.

The Sixth Circuit affirmed the district court on all grounds. First, the Sixth Circuit noted that Petitioners were not challenging Michelin's right to modify or reduce the benefits being provided under the Michelin benefit plans, because Michelin (and before it, UGTC) had always expressly reserved that right. The Sixth Circuit then focused on Petitioners' challenge to the validity of Goodrich's 1986 transfers to UGTC. In affirming the district court's holding that the 1986 transfers did not constitute a fiduciary act, the Sixth Circuit stated:

> [T]he fact that an action taken by an employer to implement a business decision may ultimately affect the security of employees' welfare benefits does not automatically render the action subject to ERISA's fiduciary duties. To adopt such a rule would, in effect, erode the well-established principle that employers are free to make decisions that modify, amend, or even terminate their employees' unvested welfare benefits.

(Pet. App. A at 11a.) The Sixth Circuit also affirmed the district court's holding that Petitioners had failed to establish a breach of duty on the part of Goodrich, even if the 1986 transfers did constitute a fiduciary act.

In addition, the Sixth Circuit affirmed the district court's determination that Petitioners' contract-based ERISA claims failed because their welfare benefit plan rights had not vested at the time of their retirement. In so doing, the Sixth Circuit stated that:

> [B]ecause vested benefits are forever unalterable, and because employers are not legally required to vest them, this Court recently held that "the intent to vest [welfare benefits] must be found in the plan documents and must be stated in clear and express language.

(Pet. App. A at 13a-14a, quoting *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir.) (en banc), *cert. denied*, 118 S. Ct. 2312 (1998), quoting, in turn, *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993).) In so doing the Sixth Circuit specifically agreed with the district court's finding that the statements found in the 1977 SPDs did not expressly guarantee lifetime benefits or create ambiguity.

Finally, the Sixth Circuit rejected Petitioners' claim that Goodrich remained liable for its failure to obtain the transferred retirees' consent. Such consent was not necessary, the appeals court concluded, because the welfare benefits never vested. The court stated that "[j]ust as [Goodrich] would not have been required to obtain plaintiffs' consent if it decided to terminate their welfare benefits altogether, the company was not required to obtain their approval to transfer its liability for paying for them." (Pet. App. A at 15a.) Petitioners then sought this Court's review.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS WITHIN THE LOWER COURTS. PETITIONERS MISREAD, MISCONSTRUE AND OVERSTATE THE HOLDING IN *HOWE v. VARITY CORP.*, 36 F.3d 746 (8TH Cir. 1994). GOODRICH SIMPLY DID NOT ENGAGE IN FIDUCIARY CONDUCT WHEN IT TRANSFERRED WELFARE PLAN OBLIGATIONS TO (THEN) UGTC.

Petitioners contend that for individuals who already have retired, the Sixth Circuit's decision below represents an irreconcilable split in how the Sixth Circuit Court of Appeals and the Eighth Circuit Court of Appeals apply the law to transfers of employee benefit plan-based obligations that result from a corporate transaction.

Petitioners misread the Eighth Circuit's holding in *Howe v. Varity Corp,* 36 F.3d 746 (8th Cir. 1994) ("*Howe II*") and ignore the prior proceedings that give *Howe II* context — particularly, the Eighth Circuit's earlier holding in *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990) ("*Howe I*"). Contrary to Petitioners' contention,[2] the facts present in this case and in *Howe II* are *not* identical. The facts relating to the disclosures made in each case are particularly inapposite. *Howe II* involved the miscommunication of important plan information by a plan fiduciary. This case involves a plan sponsor's decision to split up its pension and welfare benefit plan obligations because the company itself was being split up. The two cases are dissimilar.

More important, Petitioners do not contend, as indeed they cannot, that a deep division now exists in how the federal appeals courts currently view the transfer of benefit plan obligations in

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2. *Cfr.* Pet. at 15, where Petitioners assert that "the facts of this case and the facts in *Howe II*, as to the employees who had already retired at the time of the creation of the successor company, are identical."

connection with a corporate transaction. Several federal appeals courts have rejected attempts to either preserve or protect, or overturn, benefit plan obligations that were transferred in connection with the sale or other disposition of a business and later modified by the assuming party. *See, e.g.*, *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1379 (D.C. Cir. 1998) (upholding AT&T's transfer to Lucent Technologies of pension and welfare plan obligations and citing *Sengpiel* with approval); and *Lindenmeier v. Siemens Power Corp.*, 1995 U.S. App. LEXIS 31278, *6-7, *9-10 (9th Cir. Oct. 24, 1995) (unpubl.) (upholding Siemen's modification of welfare plan benefits, five years after it acquired the obligations from Exxon in conjunction with the purchase of a business unit from Exxon). *See also Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510-14 (10th Cir. 1996) (upholding the right to modify or terminate health plan benefits, following the sale by Control Data Corporation to Seagate Technology of one of its divisions). To the contrary, those other federal appeals court decisions broadly support the actions taken by Goodrich in this case.

Accordingly, Petitioners' attempt to manufacture a conflict in the circuits should be squarely rejected, and the Petition for Writ of Certiorari should be denied.

A. Part V of *Howe II* Recognizes Only That a Fiduciary Breach Can Result From False Communications Made in Connection With a Transfer of Welfare Plan Obligations. *Howe II* Does Not Force Plan Sponsors to Perpetually Maintain a Welfare Plan That Provides Non-Vested Benefits.

Petitioners' split-among-the-circuits argument relies almost exclusively upon Part V of the majority opinion in *Howe II*. Petitioners take Part V out of context, and in the process miss the entire point of the Eight Circuit's holding in *Howe II*. In *Howe II*, the Eighth Circuit clearly found that Massey Ferguson ("M-F") was a fiduciary of the plans it was sponsoring and maintaining,

because M-F chose to directly involve itself in the process of communicating (or in some cases, not communicating) with affected plan participants and beneficiaries.

Contrary to Petitioners' contentions, though, the Eighth Circuit in *Howe II* found Varity Corporation liable as a plan fiduciary because of Varity's conscious decision to not properly and accurately communicate the transfer of plan liabilities and the effect of those plan transfers. The Eighth Circuit did *not* find Varity liable under ERISA as a result of its decision to create an undercapitalized subsidiary (Massey Combines Corporation, or "MCC") and transfer plan liabilities to it. An earlier passage, drawn from Part IV of the *Howe II* opinion, makes the key distinction that Petitioners pretend does not exist:

> Defendants' decision to create MCC and to transfer certain assets to it, for example, was not by itself a violation of ERISA. It may have been unwise or bad business, but that is not the same thing as a breach of fiduciary duty. Plaintiffs' proof here, however, goes beyond mere business decisions on the part of defendants. "[M]isleading communications to plan participants regarding plan administration . . . will support a claim for breach of fiduciary duty." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988).

Howe II, 36 F.3d at 753-54.

In addition, the Eighth Circuit did *not* find that the retirees had vested rights under the Varity medical benefit plans, as Petitioners imply. (Pet. at 16.) The opinion in *Howe II* makes this clear, especially when read together with the Eighth Circuit's 1990 opinion, when the litigants first presented the question of whether the retirees had vested rights. Compare *Howe II*, 36 F.3d at 750-53, with *Howe I*, 896 F.2d at 1109-10.

In view of the foregoing, it becomes apparent that Petitioners misread and overstate Part V of the Eighth Circuit's opinion in *Howe II* and have no basis for alleging a conflict between *Howe II* and the Sixth Circuit's decision below. That particularly is the case since the Eighth Circuit in *Howe II* clearly was following and applying the Sixth Circuit's holding in *Berlin v. Michigan Bell Tel. Co.* — the very appeals court Petitioners now contend conflicts with it. A review of Part V of *Howe II* makes clear that the Eighth Circuit was faulting Varity Corporation for what it had (or more precisely, had not) communicated — not with the decision to transfer plan liabilities *per se*:

> As we have indicated, these employees were simply "transferred" to MCC without their knowledge or consent. **They were given no explanation, they were not asked for permission, and they were not even informed** of the "transfer" until MCC went into receivership. **Such a complete disregard of the rights and interests of beneficiaries is a clear breach of fiduciary duty** in violation of Section 1104(a)(1), and the named individual plaintiffs have a right of action for redress under Section 1132(a)(3).

Howe II, 36 F.3d at 756 (emphasis added).

The Eighth Circuit in *Howe II* thus concluded that M-F breached its fiduciary duty to the already-retired employees only because M-F made no attempt to inform the retirees about the plan transfers or to take their interests into account. Decisions by the Eighth Circuit, rendered after *Howe II* and citing *Howe II*, confirm this reading. In both *Shea v. Esensten*, 107 F.3d 625, 628 (8th Cir.), *cert. denied*, 118 S. Ct. 297 (1997) and *Anderson v. Resolution Trust Corp.*, 66 F.3d 956, 960 (8th Cir. 1995), the Eighth Circuit cited *Howe II* for the proposition that an employer's failure or willful decision to not disclose important plan changes and developments to affected participants and beneficiaries can constitute a breach of fiduciary duty under ERISA.

In view of the fact that *Howe II* was clearly decided on the basis of fiduciary miscommunication, Petitioners' attempt to link *Howe II* to this case by depicting the facts as "identical" (Pet. at 15) is inappropriate. Here, the district court explicitly recognized that the plan transfers were communicated and explained to all of the affected retirees in 1986, *prior* to the 1986 Transfers. (Pet. App. B at 26a.) The Sixth Circuit likewise recognized that Goodrich promptly communicated its business decision to the affected retirees; that is why several retirees protested the Goodrich decision in 1986 and 1987. (Pet. App. A at 6a.) Even Petitioners concede that they knew in advance that their plan interests were being transferred. (Pet. at 8.)

Petitioners ignore the fact that participant miscommunications did not control the case below, and were tangential to Petitioners' principal contention.[3] Instead, Petitioners seize upon the *dicta* that the Eighth Circuit included at the end of Part V and seek to elevate it to a wholly new legal proposition:

> An obligor (here, M-F and Varity) cannot free itself of contractually created duties without the consent of the persons to whom it is obligated. Restatement (2d) of Contracts, Section 318(3), comment d. M-F and Varity cannot unilaterally relieve themselves of obligations to the individual retirees.

Howe II, 36 F.3d at 756.

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3. Petitioners did take issue with certain statements made by Goodrich officials in 1988, years after the plan transfers occurred. Neither Michelin nor UGTC (Michelin's predecessor) took part in such statements, or in any of the separate discussions between Petitioners and their former Goodrich colleagues. However, Petitioners have never shown, or been made to show, how statements made by company officials to former plan participants two years after those participants have been removed from the plans rise to the level of fiduciary communications, if and when the underlying relationship (*i.e.*, between participant and fiduciary) no longer exists.

Petitioners' out-of-context interpretation of the Eighth Circuit's "obligor" statement (from Part V of *Howe II*, above) simply does not stand up to close scrutiny, since the Eighth Circuit was referring to a class of participants who had no vested right to the plan benefits at issue. A plan sponsor that has the generally unfettered right to extinguish the "contractually created duties" it has elected to transfer to a third party is relatively unconcerned about the consequences of a breach by the third party. If such a breach occurs, the original obligor can simply "free itself" of those duties by taking back the obligation *and then terminating and extinguishing it*. In the proceedings below, the Sixth Circuit understandably dismissed this reading of *Howe II* as illogical. 156 F.3d at 664, n.5.

Simply stated, Petitioners misread and overstate *Howe II* in an attempt to manufacture a conflict between the Eighth Circuit and the Sixth Circuit. In reality, no such conflict exists. Because Petitioners' attempt to manufacture a conflict in the circuits from the holding in Part V of *Howe II* thus fails, their Petition for Writ of Certiorari should be denied.

B. The Transfer of Plan Obligations to a New Plan or New Plan Sponsor Constitutes a Plan Amendment, Not a Fiduciary Act. Petitioners' Attempt to Transform the 1986 Transfers Into a Fiduciary Act is Fundamentally at Odds With Prior Decisions by This Court.

Petitioners also contend that Goodrich's transfer of welfare benefit plan obligations was something other than a plan amendment, and instead constituted a form of fiduciary conduct subject to ERISA's fiduciary duty rules. Petitioners' central premise — that Goodrich necessarily engaged in fiduciary conduct once it decided to split the company (and with it, its benefit plans) into two almost equal parts — is wholly at odds with several recent pronouncements by this Court. Because this Court already has clearly drawn the line between settlor activity and fiduciary conduct in at least three decisions issued in the past four years, this Court

does not need to do so again. Accordingly, this Court should reject Petitioners' invitation to hear this case.

This Court has repeatedly stressed that the act of amending or modifying an employee benefit plan under ERISA constitutes a "settlor" function, not subject to ERISA's general fiduciary rules. In *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), this Court broadly reiterated what it had said two years earlier, in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995):

> Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries. As we said with respect to the amendment of welfare benefit plans [citation omitted], "employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." When employers undertake those actions, they do not act as fiduciaries, but are analogous to the settlors of a trust.

Lockheed, 517 U.S. at 890 (quoting *Schoonejongen*, 514 U.S. at 78).

Within the past several weeks, this Court has again stressed that a plan sponsor's actions are not fiduciary in nature. In *Hughes Aircraft Co. v. Jacobson*, 1999 U.S. LEXIS 753 (January 25, 1999), *rev'g* 105 F.3d 1288 (9th Cir. 1997), this Court again was compelled to point out that a plan sponsor does not act as a fiduciary when it makes changes to its plan. In *Hughes*, the appellants contended that the amendment process amounted to a sham transaction, because the plan's participants and beneficiaries had a more significant equitable interest in the underlying plan assets. Flatly rejecting that view, this Court broadly asserted in a plurality opinion that:

> In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employers' fiduciary

> duties which consist of such actions as the administration of the plan's assets. [Citation omitted.] **ERISA's fiduciary duty requirement simply is not implicated where** Hughes, acting as **the plan's settlor, makes a decision regarding the form or structure of the plan such as who is entitled to receive plan benefits** and in what amounts, or how such benefits are calculated.

Id. at [*22] (emphasis added).

In the case below, Goodrich made the decision to split its pension and welfare benefit plans into two almost equal parts because it was splitting its business into two almost equal parts. Such split-ups invariably require a plan sponsor to separate out single plan populations into two separate plan populations. Goodrich thus was compelled to decide — and did decide — which participants and beneficiaries would be covered by each of the two plans. Petitioners simply ended up being covered by those pension and welfare plans (and plan liabilities) transferred to and assumed by (then) UGTC. Such plan "form or structure" decisions fall squarely within the broad definition of settlor activity just announced by this Court in *Hughes*.

Petitioners already have an answer to their contention that Goodrich's actions amount to fiduciary activity: that answer was provided by this Court in *Hughes*. Accordingly, The Petition for Writ of Certiorari should be denied.

C. Petitioners' Attempt to Argue Contract Assignment Principles Does Not Square With ERISA's Regulatory Scheme.

Petitioners' contention that the very act of transferring welfare plan obligations constitutes fiduciary conduct rests on the premise that a plan participant can be removed from a welfare benefit plan only with his consent — apparently, even if the participant has no vested right to benefits under the plan. Compare *Howe II*, 36 F.3d

at 752 (affirming that the retirees have no contract claims because they lack vested plan rights) with *Howe II*, 36 F.3d at 756 (employer breached its duty in the manner in which transfers occurred). A review of ERISA's regulatory scheme, and established trust law principles, makes clear that Petitioners' attempt to impose a contract/assignment obligation on Goodrich is wholly inconsistent with ERISA and without other precedent.

This Court has long held that ERISA "abounds with the language and terminology of trust law." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). That view supports and explains why this Court recognized the deferential, arbitrary and capricious standard used to review discretionary acts of properly empowered fiduciaries. *Firestone*, 489 U.S. at 111. That view also supports and explains why this Court in *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253 (1993), held that ERISA's remedies are essentially equitable in character, and why this Court in *Howe v. Varity Corp.*, 516 U.S. 489 (1996), recognized that the process of communicating and explaining the terms of an employee benefit plan to its participants and beneficiaries generally constitutes a fiduciary act under ERISA. Finally, this Court repeatedly casts the sponsor of an employee benefit plan in the role of the settlor. *E.g.*, *Firestone*, 489 U.S. at 111-112; *Schoonejongen*, 514 U.S. at 79, 82.

ERISA's statutory framework recognizes the different roles played by the original promisor and the third party entrusted with carrying out the underlying promise. Under traditional trust law, the trust settlor and the trustee assume these roles, respectively; the trustee's undertaking commences as soon as the trust is declared and the settlor's instructions are provided to the trustee. Restatement (Second) of Trusts, §§ 4, 331.[4] ERISA maintains a

4. For most ERISA-regulated employee benefit plans, the plan thus takes the form of a self-settled trust. More formalized and funded employee benefit plans, such as employee pension benefit plans, clearly identify the dividing line in documentation. For unfunded employee welfare benefit plans, identifying the dividing line invariably is more circumspect.

closely analogous scheme: it treats the "plan" as the manifestation of the settlor's intent, and directs participating employees and third parties to look to their plan — rather than to their employer — for payment of their benefits and related claims *by making the plan the obligor*, similar to the way a *cestui que trust* looks to the trust — and not the settlor — for whatever benefits they might reasonably receive.

That is why employee benefit plans can sue and be sued under ERISA as entities, 29 U.S.C. § 1132(d)(1), as this Court recognized long ago in *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825 (1988). That also is why judgments against plans can be enforced only against the plans themselves and cannot be enforced against any other persons unless liability is established against those other persons in their individual capacities. *Id.* at 832.[5] Also 29 U.S.C. § 1132(d)(2). Further, that is why numerous courts have rejected suits for plan benefits that were brought solely against employers, rather than against the plans obliged to pay them. A long list of federal appeals courts decisions — including the Eighth Circuit's recent decision in *Hall v. LHACO*, 140 F.3d 1190 (8th Cir. 1998) — support the principle that the plan is the real obligor, not the plan sponsor.[6]

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5. As this Court explained in *Mackey*:

> At the outset, we consider the several types of civil suits that can be brought against ERISA welfare benefit plans. First, ERISA's § 502 provides that civil enforcement actions may be brought by particular persons against ERISA plans to secure specified relief, including the recovery of plan benefits.

Mackey, 486 U.S. at 832.

6. *E.g.*, *Riordan v. Commonwealth Edison Co.*, 128 F.3d 549, 551 (7th Cir. 1997) (only plan can be sued for benefits); *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993) (same); *and Madden v. ITT Long Term Disability Plan*, 914 F.2d 1279, 1287 (9th Cir. 1990) (same), *cert. denied*, 498 U.S. 1087 (1991). *See Garren v. John Hancock Mut. Life Ins. Co.*, 114

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Finally, that is why ERISA broadly defines the role of "plan sponsor," 29 U.S.C. § 1002(16)(B), and implicitly permits one plan sponsor to be substituted for another — without requiring any amendment or modification of the underlying employee benefit plan documents (assuming the plan language defines the sponsor broadly as do many plan documents). All ERISA requires is that a plan sponsor be a person[7] that is "acting directly as an employer, **or indirectly in the interest of an employer**, in relation to an employee benefit plan." 29 U.S.C. § 1002(5) (emphasis added).[8] ERISA contains no prohibition against sponsor-initiated plan amendments or sponsor substitutions, and Petitioners have not identified any statute or rule indicating otherwise.

Given the foregoing, it is clear that Petitioners make far too much of the Eighth Circuit's commentary in *Howe II*. A finding that a plan sponsor (there, M-F; here, Goodrich) has a direct "obligation . . . to the individual retirees," *Howe II*, 36 F.3d at 756, ignores the role played by the employee benefit plan in ERISA's statutory scheme. Accordingly, Petitioners' attempt to raise traditional state law concepts — presumably, in the context of federal common law — should be ignored and their Petition for Writ of Certiorari should be denied.

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F.3d 186 (11th Cir. 1997) (both plan and fiduciary can be sued for benefits, so long as relief indicates who is liable); *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433 (3d Cir. 1997) (same); and *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir.) (same), *cert. denied*, 488 U.S. 826 (1988).

7. ERISA even defines a "person" broadly, to include individuals, partnerships, joint ventures, corporations, mutual companies, trusts, estates, associations, and similar beings. 29 U.S.C. § 1002(9).

8. Compare 29 U.S.C. § 1002(16)(B) (defining "plan sponsor" as an "employer" in single employer plan situations) with 29 U.S.C. § 1002(5) (defining employer broadly, to include those acting indirectly).

II. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS MISREAD AND OVERSTATE THE SIXTH CIRCUIT'S HOLDING THAT PETITIONERS' RIGHTS DID NOT VEST. CONTRARY TO PETITIONERS' CONTENTION, THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH DECISIONS BY THIS COURT AND OTHER CIRCUIT COURTS.

Petitioners also seek this Court's review by broadly alleging that the Sixth Circuit, below, established an "almost irrebuttable presumption against vesting [that] is contrary to the law of other circuits." (Pet. at 22.) Petitioners misrepresent the Sixth Circuit's holding, and conveniently overlook numerous other appeals court decisions that broadly support the Sixth Circuit's position below by subjecting litigants seeking "lifetime" medical benefits to an equally rigorous standard.

In *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), this Court established the framework for lower courts required to consider the "vesting" question in a welfare benefit plan regulated by ERISA. Since this Court's decision in *Schoonejongen* the federal courts of appeal have looked to see whether a commitment can be found rather than simply assuming that such a commitment exists. Merely because Petitioners are unhappy with the state of the law is no reason for this Court to take this case.

A. The Sixth Circuit's Decision is Not Contrary to Decisions by Other Circuits or Prior Sixth Circuit Decisions.

The Sixth Circuit's opinion, below, belies Petitioners' contention that the holding in this case is contrary to the law espoused in the other circuits. For example, in its opinion the *Sengpiel* court explicitly embraced the standard adopted by the Fifth Circuit Court of Appeals in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993).

(Pet. App. A at 13a-14a.) More important, the Sixth Circuit's opinion below reveals that in *Sengpiel* the Sixth Circuit followed and applied a case this Court recently declined to hear: the Sixth Circuit's *en banc* decision in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (en banc), *cert. denied*, 118 S. Ct. 2312 (1998).

Contrary to Petitioners' contention, it now is well settled that ERISA does not impose any vesting requirement on employee welfare benefit plans. Rather, welfare benefits vest only if provided by contract. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). *See Wise*, 986 F.2d at 934-35. While such a "contract" commitment can be made under a collective bargaining agreement, the rule remains clear and absolute: the contractual commitment to provide benefits for life must be found — somewhere — before it can be enforced. *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *Int'l Ass'n of Machinists v. Masonite Corp.*, 122 F.3d 228, 231 (5th Cir. 1997); and *American Fed. of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 979 (2d Cir. 1997) (all, rejecting welfare benefit plan vesting claims based on inference).

The standard applied by the Sixth Circuit in *Sengpiel* — that an employer's intent to vest must be based on evidence drawn from the governing plan documents — thus is fully consistent with all retiree medical benefits cases decided after this Court handed down *Schoonejongen* in 1995. An employee who attempts to prove vesting bears the burden of proof. An examination of the cases Petitioners cite in support of their petition illustrates this point.

B. Petitioners Ignore the Fact That Lower Court Holdings Issued After This Court Decided *Curtiss-Wright Corp. v. Schoonejongen* Have Adopted a Presumption That Retiree Welfare Rights Do Not Vest.

In their brief, Petitioners concede that both the district court and the Sixth Circuit broadly rejected Petitioners' claim of a vested

right to lifetime medical and life insurance benefits under the Goodrich plans.[9] (Pet. at 12, 13.) Petitioners nonetheless contend that the Sixth Circuit's conclusion lacks any judicial support, and assert that the standard used by the Sixth Circuit below is inconsistent with the standard being used by all other appellate courts. (Pet. at 22.) Petitioners grossly misstate the Sixth Circuit's holding, and the state of the law in the other appellate circuits.

First and foremost, Petitioners cannot credibly rely upon cases decided before this Court handed down *Curtiss-Wright Corp. v. Schoonejongen* in 1995. *Schoonejongen* prompted the lower courts to generally re-examine the relationship between a welfare benefit plan's operative provisions and the plan sponsor's reserved right to amend or modify the plan, notwithstanding the operative language. That is why the appellate courts that have reconsidered lawsuits brought by retirees after *Schoonejongen* have concluded that a plan sponsor's broadly reserved right to amend or modify the plan can be used to amend or modify all of the plan's terms — even those that purport to create ongoing, lifetime benefits. In addition, that is why the Sixth Circuit in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (en banc), *cert. denied*, 118 S. Ct. 2312 (1998)), rejected retirees' vesting claims based on both the plan's operative provisions and administrative practices: because the underlying plan preserved the plan sponsor's right to alter all of the plan's terms.

That also is why the Seventh Circuit in *Frahm v. The Equitable Life Assur. Soc'y*, 137 F.3d 955 (7th Cir.), *cert. denied*, 119 S. Ct. 55 (1998), rejected the retirees' "vesting" arguments, which were based on plan practices that were not grounded in the plan's governing language. Excerpts from the Seventh Circuit's opinion

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9. Compare Pet. at 12 ("On petitioners' contract-based claim the court held that petitioners could be successful only if their benefits vested at retirement at the level of coverage they were now claiming") with Pet. at 12 ("The Sixth Circuit also agreed with the district court that the retirees' welfare benefits were not vested.")

in *Frahm* illustrate this fundamental change in how the lower courts now approach welfare benefit plan "vesting" questions after *Schoonejongen*:

> ERISA provides that [benefit] plans must be established in writing, *see* 29 U.S.C. § 1102(a)(1), which is a long way toward a statute of frauds -- as is the Supreme Court's observation that under ERISA "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995). Although § 1102(a)(1) does not cover all possible ground — it leaves open, for example, the possibility that a written plan may be combined with an oral promise, such as an undertaking to give a worker twice the benefits so established — **the utility of reducing retirement promises to writing and avoiding arguments about who said what to whom are so fundamental to both ERISA and contract law that an extension of the writing requirement to all long-term commitments is an inescapable ingredient of the federal common law slowly accumulating in ERISA's shadow.** *Sprague* [*v. General Motors Corp.*] made this extension, and sensibly so. *Cf. Mohr v. Metro East Mfg. Co.*, 711 F.2d 69 (7th Cir. 1983) (departure from terms of a collective bargaining agreement permissible only if in writing). All ten judges who sat *in Bidlack* [*v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993)] relied on writings; none suggested that a wholly oral promise could require the employer to provide lifetime benefits.

Frahm, 137 F.3d at 958 (emphasis added). The logic behind such a conclusion is apparent: if welfare benefit plan commitments only

contractually vest, a court can only hold a plan sponsor to a 20-year to 40-year commitment if the commitment has been clearly and carefully made.

Second, Petitioners' attempt to rely on cases that involve the interpretation of a collective bargaining agreement is misplaced because the interpretation of a collective bargaining agreement (i.e., the underlying commitment) invariably involves different legal principles.[10] Pet. at 22-25 (citing *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987) (interpretation of a Steelworkers' bargaining agreement); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989) (interpretation of a Steelworkers-negotiated shutdown agreement); *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252 (5th Cir. 1990); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984) (interpretation of a Steelworkers-negotiated shutdown agreement); *Diehl v. Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996) (interpretation of a UAW-negotiated shutdown agreement); *Int'l Ass'n of Machinists v. Masonite Corp.*, 122 F.3d 228 (5th Cir. 1997) (interpretation of a Machinists-negotiated bargaining agreement); and *Stewart v. KHD Deutz of Am. Corp.*, 980 F.2d 698 (11th Cir. 1993) (interpretation of a UAW-negotiated bargaining agreement)).

Retiree welfare benefit "vesting" rights that arise under a collective bargaining agreement profoundly differ from those that arise solely under a welfare benefit plan. A collective bargaining agreement gives a court a second contract to examine when determining whether an employer intended that retirees would acquire vested rights for life. A collective bargaining agreement also presents special circumstances not found when rights arise —if at all — solely under a welfare benefit plan. A bargaining agreement creates a tripartite relationship between: (1) the

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10. As noted generally above, virtually all of the cases Petitioners cite, including the collective bargaining agreement cases, were decided prior to this Court's decision in *Schoonejongen*, and therefore are of questionable precedential value.

employer; (2) the union; and (3) a class of third party beneficiaries that always includes bargaining unit employees and only sometimes includes retired employees who no longer are part of the bargaining unit.

Because unions can and frequently do negotiate on behalf of both future retirees and current retirees, *Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181, n.20 (1971), it frequently is unclear whether a union has bargained for both future retirees and already-retired employees whose plan rights are subject to termination, or whether the union has not been bargaining for already-retired employees because they have continuing rights that arise under one or more prior bargaining agreements. *Cf. Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207-08 (1991).

Even a cursory examination of more recent appeals court decisions involving collectively bargained retiree medical benefits reveals these obvious — and distinguishing — ambiguities. *See Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 655 (6th Cir.) (discussing role played by *Litton* in determining whether retirees' rights continued despite the expiration of the underlying collective bargaining agreement), *cert. denied*, 519 U.S. 807 (1996); and *Int'l Ass'n of Machinists v. Masonite*, 122 F.3d at 233 (same). As the Fifth Circuit pointedly observed in *Masonite*:

> In the absence of the CBAs, the Plan's reservation-of-rights clause granting the company the right to amend or terminate the Plan might well end the inquiry in the company's favor.

Masonite, 122 F.3d at 233.

Even if the bargaining agreement cases cited by Petitioners did have some bearing on how the lower courts have been applying and construing *Schoonejongen*, most courts now examine the bargaining agreement to find clear signs of an affirmative commitment; inferences no longer are sufficient. *E.g.*, *United*

Paperworkers Int'l Union v. Champion Int'l Corp., 908 F.2d 1252 (5th Cir. 1990); *Int'l Ass'n of Machinists v. Masonite Corp.*, 122 F.3d 228 (5th Cir. 1997). *See espec. American Fed. Of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 979 (2d Cir. 1997) ("The rule under section 301 is similar — after a CBA expires, an employer generally is free to modify or terminate any retiree medical benefits that the employer provided pursuant to that CBA."); and *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 606 (7th Cir. 1993) (*en banc*) ("[O]rdinarily when a contract expires, it — expires. It is at an end . . . a court should cast a cold eye on contentions that a contract with a fixed term actually created a perpetual obligation"), *cert. denied*, 510 U.S. 909 (1993).

Third, neither of the pre-*Schoonejongen* non-bargaining-agreement cases cited by Petitioners alters or undermines this principle. In *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992), for example, the Third Circuit concluded that the plan's language that was found to be ambiguous, probably because the language implied that the benefits would remain in effect at least until the retiree died. (Pet. at 24-25.) *Id.* at 91-92. The language in *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) was more blatant, and undermined the very premise on which this Court decided *Schoonejongen*: that a plan sponsor can amend, modify or terminate a plan it sponsors if it has reserved the right to do so. In *Jensen*, the SIPCO plan provided that "benefits will be provided until the retiree dies. . . ." (Pet. at 25.) More important, though, the SIPCO plan restricted the sponsor's right to amend or modify the plan, by specifying that amendments generally would "not be applicable to persons who [were] receiving pensions . . . prior to the effective date of such amendment." *Id.* at 948-50.[11] In both cases, the appeals courts

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11. Additionally, the Eighth Circuit in *Jensen* found that the plan language was ambiguous, not that the language evidenced a commitment to lifetime benefits, as Petitioners contend. *Id.* Notably, the Eighth Circuit (Cont'd)

were not in a position to presume that the employers were "**generally free** under ERISA . . . to adopt, modify or terminate [the] welfare plan[ ]," *Schoonejongen* 514 U.S. at 78 (emphasis added), because the sponsor had expressly limited its right to make plan modifications that affected already retired employees.

The one post-*Schoonejongen* non-bargaining agreement case cited by Petitioners presents facts almost identical to those found in *Jensen*, and thus is clearly distinguishable from the facts in this case. In *Barker v. Ceridian*, 122 F.3d 628 (8th Cir. 1997), the Eighth Circuit held that — consistent with the standard adopted by the Sixth Circuit below — clear plan language was needed to support the retirees' contention that their benefits would not be cut off by a plan termination. *Id.* at 635. The appeals court nonetheless found that the disability retirees were vested, but only because the plan's reservations-of-rights language specifically protected the disability retirees from a cutoff in benefits if the plan terminated. The language used in the Ceridian plan left little room for doubt that the plan sponsor had partially surrendered its right to amend, modify or terminate:

> If the group Long-Term Disability Plan terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claim for such benefits will continue as long as you remain totally disabled as defined by the plan.

Id. at 631.

In sum, Petitioners' contention that the Sixth Circuit is alone in its views is fundamentally incorrect and should be disregarded. This is a "contract" case that Petitioners lost on the facts. Accordingly, the Petition for Writ of Certiorari should be denied.

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recently held in *Bierman v. Pirelli Armstrong Tire Corp.*, 1998 U.S. App. LEXIS 16398 (8th Cir.; July 17, 1998) (unpubl.), that vesting could not simply be inferred under a welfare benefit plan — and cited *Jensen* in support of that proposition.

CONCLUSION

Petitioners were found to not have a vested, enforceable right to lifetime medical benefits. Accordingly, any continuing benefits they received from Goodrich (or from any transferee of Goodrich) constituted an act of forbearance by Goodrich. Such forbearance hardly constitutes a breach of fiduciary duty. The Eighth Circuit's actual holding in *Howe II* is not to the contrary.

There is no split between the circuit courts of appeal. This case does not present issues potentially affecting retirees across the country, just Petitioners and those other retirees transferred by Goodrich to the employee welfare benefit plans now sponsored and maintained by Michelin. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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